



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 882 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOSHUA NYAKUNDI NYAGEKO.....CLAIMANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

The claim herein was instituted vide the claimant's Statement of Claim dated 15<sup>th</sup> May, 2015 and filed in Court on 22<sup>nd</sup> May, 2015. It is the claimant's averment in the statement of claim that he was employed by the Respondent herein on or about 3<sup>rd</sup> May, 1988 in the position of clerk and rose through the ranks to the position of Acting Team Manager – Cash and Data Capture Department earning a monthly salary of Kshs.128,000 at the time of his separation from the respondent.

The Claimant avers that during the subsistence of his employment with the Respondent he performed his duties diligently and to the Respondent's satisfaction until 29<sup>th</sup> August 2014 when his services were unfairly and unlawfully terminated by the Respondent without notice or justifiable cause on the allegation of negligence in the performance of his duties.

The Claimant contended that there was no valid reason for the termination of his employment and that he was never accorded a fair hearing prior to the decision to terminate his employment contrary to the provisions of Section 41 of the Employment Act, 2007.

The Claimant further contended that the termination was based on the allegation of fraudulent transaction of KShs.1.138 Billion that was processed from two GL accounts GL 333030200 and GL 242030650 on 7<sup>th</sup> April, 2014 which he maintained were not processed by him and therefore he was innocent.

He further maintained that he was not accorded enough time to defend himself on the allegations levelled against him taking into account the many years of service he had worked for the Respondent. It was his contention that the decision to terminate his employment was draconian and unfair in the circumstances.

In the claim, he seeks the following reliefs:-

1. A declaration that the Claimant's termination from his employment was wrongful and unlawful.
2. The Claimant be reinstated to his previous employment without loss of benefits and continuity of service and all the salaries during the period of suspension and dismissal be restored to him.
3. In the alternative to 2 above the Claimant be paid his full terminal dues for unfair dismissal as tabulated below:
  - i. Salary for September 2014 Kshs.128,000
  - ii. Salary in lieu of notice Kshs.128,000
  - iii. Service gratuity Kshs.1,664,000
  - iv. Prorata leave for 9 months Kshs.88,614

v. 12 months' compensation for unlawful

termination (Kshs.128,000 x 12) Kshs.1,536,000

**Total Kshs.3,544,614**

vi. Certificate of Service

4. The Respondent be ordered to compensate the Claimant for wrongful termination at the equivalent of 12 months' gross salary.
5. The court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
6. The Respondent be ordered to issue the Claimant with a Certificate of Service as required by the provisions of Section 51 of the Employment Act, 2007.
7. The Respondent to pay the costs of this Claim.
8. Interest on the above at Court rates.

The Respondent in its Memorandum of Defence dated 9<sup>th</sup> February, 2015 and filed in Court on 10<sup>th</sup> February 2015 confirms that the Claimant was suspended on 11<sup>th</sup> April 2014 pending investigations into a fraudulent transaction he processed from two GL accounts GL 333030200 and GL 242030650 on 8<sup>th</sup> April 2014.

The Respondent avers that it did conduct its own independent investigations on the said transactions which revealed negligence on the part of the Claimant as he failed to exercise due reasonable care and skill in his role and therefore exposed the Respondent to the risk of losing Kshs.1.138 Billion.

The Respondent further avers that the Claimant failed to refer the transactions yet they were above his limit of Kshs.100,000,000. It is for these reasons that the Respondent maintained that it was justified to terminate the Claimant's employment as his actions amounted to gross misconduct under Section 44(4)(c) of the Employment Act, 2007.

The Respondent contended that contrary to the Claimant's assertions it did accord him an opportunity to appear before the disciplinary panel and was accordingly heard. It maintained compliance with the mandatory provisions of Section 41 of the Employment Act, 2007 in the Claimant's termination.

The Respondent further contended that the Claimant being a management employee under Clause 2 of the Recognition Agreement between Banking Insurance & Finance Union and Kenya Bankers Association was excluded from union representation at the disciplinary hearing, a fact that was duly explained to the Claimant who opted to proceed with the hearing without such representation.

The Respondent maintained that the Claimant is not entitled to the reliefs sought in his Statement of Claim and therefore urged this Court to dismiss the same with costs to the Respondent.

The suit was heard on 4<sup>th</sup> April and 25<sup>th</sup> July, 2019 with the Claimant testifying on his own behalf and the Respondent calling one witness to testify on its behalf. At the hearing both parties reiterated their positions as per pleadings.

### **Submissions by the parties**

It is submitted by the Claimant that the termination of his employment was unfair and unlawful as the Respondent had no valid reason to do so. He further maintained that the assertion that he was negligent in the performance of his duties and the alleged failure to comply with the Respondent's laid down procedures and regulations is untrue and baseless.

The Claimant further submitted that contrary to the Respondent's assertion of negligence, he performed his duties with due diligence with strict adherence to set down procedures. He further maintained that he did not authorize any fraudulent transaction and that the document preparation department leader was responsible for verifying signatures, which he did. He further submitted that he was not careless in his work and that he actually saved the Respondent from a potential loss of Kshs.1.138 Billion. The Claimant relied on the case of **JMD v Nacico Sacco Society Limited (2016) eKLR** where the Court held a dismissal from employment must be valid and for justifiable reasons and such dismissal must be carried out through fair procedure, failure to which the Court shall find the dismissal unfair.

The Claimant further submitted that, although some semblance of hearing was done, the same does not meet the threshold for procedural and substantive fairness. He therefore urged this Court to find that his termination was unfair and unlawful as there was no valid reason for the same.

The Claimant maintained that the Respondent failed to adhere to the provisions of Sections 41, 43 and 45 of the Employment Act, 2007 thus making his termination unfair. He further contended that the Respondent's actions were contrary to the provisions of Clause 22 of the recognition agreement between the Kenya Banker's Association and the Banking Insurance & Finance Union which provides "...In representing such an appeal, he/she shall be entitled to the assistance of any co-employee of the Bank he/she may choose." It was his

submission that he was denied to attend the disciplinary hearing with one Mr Chege by virtue of his non-union membership.

On remedies the Claimant submitted that he is entitled to all the reliefs sought in his Statement of Claim by dint of Sections 35, 36, 49 and 51 of the Employment Act, 2007. He urged the Court to allow the Claim as prayed.

### **Respondent's Submissions**

The Respondent on the other hand submitted that it had a valid reason to terminate the Claimant's employment and that in doing so it followed due process.

It is further the Respondent's submission that the Claimant failed to carry out his duties with due diligence which is a blatant breach of its Rules and Regulations. The Respondent relied on the case of **Cabiakman v Industrial Alliance Life Insurance Co. 2004 SCC 55** where the Court held that an employee is bound to carry out his or her work with prudence and diligence and act fairly and honestly towards the employer in absence of which the Respondent may terminate such employment for gross misconduct with loss of all benefits.

The Respondent further urged this Court to be guided by the case of **CMC Aviation Limited v Captain Mohammed Noor Civil Appeal No. 199 of 2013 (UR)** and find that the Claimant's termination was warranted taking into consideration his conduct and the liability and risk he caused the Respondent in his dealings.

The Respondent maintained that it did adhere to the provisions of Section 41, 43, 44 and 45 of the Employment Act, 2007. The Respondent further urged this Court to find that it had met the legal threshold of fairness as the Claimant was afforded the opportunity **to be heard in a fair process prior to his termination.**

The Respondent further submitted that the Claimant is not entitled to the reliefs sought in his Statement of Claim and urged this Court to dismiss the Claim in its entirety with costs to the Respondent relying on the case of **Bangue Indosuez v DJ Lowe and Company Limited (2006) 2 KLR 208.**

### **Determination**

Having considered the facts of this cause, evidence, submissions and authorities cited, the issues for determination are: -

1. Whether the termination of the Claimant's employment was valid both procedurally and substantively.
2. Whether the Claimant is entitled to the reliefs sought.

Section 41 of the Employment Act provides for the procedure for termination while section 43 of the Employment Act provided that the employer must prove valid reason.

The statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is provided for in Section 47(5) of the Employment Act. The section provides that –

**For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

The reason for termination as cited in the Claimant's letter of termination dated 29<sup>th</sup> August, 2014 was as follows:

*"We refer to the disciplinary hearing conducted on Thursday, 14<sup>th</sup> August 2014 and Monday 18<sup>th</sup> August 2014 following your written statement regarding your negligent processing of fraudulent instructions of Kes.1.138 Billion (GBP 9.6m) on 7<sup>th</sup> April 2014, we are satisfied that you were negligent in the performance of your duties, failed to adhere to the Bank's laid down regulations and terms and conditions of your employment."*

The claimant's letter of appointment to the position of Supervisor, Data Capture Section reads as follows –

*"28<sup>th</sup> March 2014*

*Joshua Nyakego*

*Corporate Service Centre*

*Dear Joshua*

**ACTING LETTER – (Team Manager Data Capture/Cashiers)**

*This is to advise that you shall be acting as a Team Manager from (1<sup>st</sup> April to 14<sup>th</sup> April 2014).*

*You are therefore employed to exercise all duties and powers as a Team Manager, Data Capture/Cashiers Team.*

*I trust you will undertake this role with diligence and enthusiasm.*

*Below are the authorised limits:*

**RE: AUTHORISATION LIMITS AND CALL BACKS LIMIT**

*Your authorisation limits have been reviewed as follows.*

- 1. Call back limit Kes.100,000,000 (One hundred million only)*
- 2. Deposit limit for Corporate C/A only Kes.500,000,000 (Five hundred million only)*
- 3. Cash withdrawal limit for Corporate C/A only Kes.100,000,000 (One hundred million only)*

*NB: You are personally responsible for:*

- Verifying the technicalities of all transactions within your limit.*
- Being satisfied as to the genuineness of the transaction. Where in doubt, refer to the immediate senior official, who will make a pay/no pay decision.*

*1. In the absence of the Manager you will assume her limits.*

*2. Ensure that you familiarise yourself with the laid down operational requirements as stipulated in the FTOS policy, Cash Operations Manual, Manual Payments and relevant circulars released on an ongoing basis.*

*Please sign below to signify compliance to these requirements.*

*SIGNED Date: 1<sup>st</sup> April 2014*

*Sincerely*

*SIGNED*

*CHARLES ARICI*

*CENTRE MANAGER CORPORATE”*

The transactions that are the subject matter of the termination of his employment were for the following amounts –

- 1. Kshs.105,000,000*
- 2. Kshs.115,000,000*
- 3. Kshs.185,000,000*
- 4. Kshs.215,000,000*
- 5. Kshs.303,000,000*
- 6. Kshs.215,000,000*

Each of the transactions were thus above his authorisation limit of Kshs.100,000,000.

According to the evidence, the claimant passed on the transactions to Data Capture Processor who alerted him of the huge amounts that looked suspicious and referred them back to the claimant for verification with the originating centre. Had the Date Capture Processor not been alert, the money would have been lost as this was the last stage of processing the payments. The claimant only verified the genuineness of the transactions after the Data Capture Processor returned them to him, instead of doing so before passing them on to the Data Capture Processor.

I find that the claimant was negligent in the performance of his duties by processing amounts above his authorisation limit and the respondent thus had valid reasons to terminate his employment.

On the disciplinary process, the claimant was first heard in the absence of a fellow employee after he insisted on being accompanied by a union shop floor official. During his appeal and the subsequent hearing, he was accompanied by a fellow management colleague. Both himself and his representative confirmed that the second hearing was fair.

In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** the Court held that:

*“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”*

I find that the termination of the claimant’s employment was fair both substantively for valid reason, and procedurally as the process was compliant with Section 41 of the Act.

#### **Whether the Claimant is entitled to the reliefs sought**

Having found that the termination of the Claimant’s employment was valid, he is not entitled to a declaration that he suffered an unfair, invalid and unlawful termination of employment. He is further not entitled to the prayer for reinstatement for the same reason and also for reason that his employment was terminated in the year 2014 which is more than six years ago as reinstatement is only available within 3 years from the date of termination.

In the case of **Benson N. Irungu v Total Kenya Limited (2015) eKLR** the Court dismissed a prayer for reinstatement as the termination took place more than 10 years before to the date of judgment and as such a remedy was not available. Section 12(3) of the Employment Act provides that such a relief can only be awarded within 3 years of termination.

The same reasons, that is, that there was no proof of unfair termination, apply to the prayer for payment of Kshs.3,544,614 being salary and allowances lost as a result of the termination of his employment and for the prayer for compensation.

The upshot is that the entire claim is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF JUNE 2020**

**MAUREEN ONYANGO**

**JUDGE**

#### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**